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Supreme Court, U.S.
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No. 94-1316

IN THE

Supreme Court of the United States

October Term, 1994

SOUTHVIEW FARM and RICHARD H. POPP,

Petitioners,

against

CONCERNED AREA RESIDENTS FOR THE ENVIRONMENT, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF *AMICI CURIAE* DAIRYLEA COOPERATIVE INC. AND NATIONAL MILK PRODUCERS FEDERATION IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

1. Whether the burdens imposed upon dairy farmers, consumers, government and the courts by the decision of the Court of Appeals justify the granting of certiorari.

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CONCERNED AREA RESIDENTS FOR THE ENVIRONMENT, et al.,

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BRIEF OF AMICI CURIAE

Dairylea Cooperative Inc. and National Milk Producers Federation in Support of Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

Preliminary Statement

Dairylea Cooperative Inc. ("Dairylea") and the National Milk Producers Federation ("NMPF") submit this brief as amici curiae pursuant to Rule 37.2 of the Rules of this Court, in

support of Petitioners, Southview Farm and Richard H. Popp (the "petitioners").

Interest of Dairylea Cooperative Inc. and the National Milk Producers Federation as Amici Curiae

Dairylea Cooperative Inc. ("Dairylea") is a farmer-owned dairy cooperative of approximately 2,300 members, including petitioners, with dairy farms in New York, Pennsylvania, New Jersey, Maryland and most New England states. Dairylea markets approximately 3.5 billion pounds of milk annually and participates in a milk marketing network stretching from Maine to Maryland to Ohio.

The National Milk Producers Federation ("NMPF") has 34 cooperative members (such as Dairylea), 30 corporate associate members, and 15 individual associate members which produce milk in the 48 contiguous states. The aggregate member milk volume for 1994 was 81.7 billion pounds of milk.

Both Dairylea and NMPF are dedicated to the pursuit of public policy that promotes responsible, efficient, and environmentally sound dairy production and the distribution of healthful dairy products to the American consumer. The decision of the Second Circuit in Concerned Area Residents For The Environment v. Southview Farm, 34 F.3d 114 (2d Cir. 1994) (the "Decision") adversely impacts Dairylea's and NMPF's members as well as tens of thousands of dairy farmers across the country.

In enacting the Clean Water Act and its exemptions for farms, Congress recognized the nature and importance of farming by creating the "agricultural stormwater exemption"

which is the subject of this case. 33 U.S.C. § 1362(14). The Decision, which eviscerates this clear and important exemption, will improperly subject tens of thousands of dairy farmers to a myriad of regulation and costs, inspection mandates, fines, criminal penalties, incalculable litigation, and additional federal and state bureaucracy. The Decision is particularly disconcerting for two reasons. First, the Second Circuit determined that Southview Farm, including the crop and forage crop areas, should not be treated as a farm which is exempt from the Clean Water Act, but rather as a Concentrated Animal Feeding Operation ("CAFO") which is subject to the Act. This determination demonstrates a lack of understanding of dairy farming as an integrated operation which houses and feeds livestock, grows crops and silage using the natural by-product of manure as fertilizer, and produces milk.

Second, the Decision creates far reaching adverse implications for all farmers by determining that the mere application of liquid manure on agricultural crop land is not exempt from the definition of a "point source" and could be a violation of the Clean Water Act. This holding exposes thousands of farmers to potential regulation and litigation which was clearly not intended by Congress.

Summary of Argument

By its misconstruction of federal law and EPA regulations, the Court of Appeals has engaged in "judicial legislation" which will create an unacceptable burden on farmers, government, and the courts which was never intended by Congress.

ARGUMENT

POINT I

The Court of Appeals, by misconstruing both federal law and EPA regulations, has imposed a substantial burden upon dairy farmers and consumers.

As set forth in detail in the petition and the briefs of the other amici, the Second Circuit misconstrued the Clean Water Act and eliminated exemptions created to protect dairy farms. (Petition, pp. 15-18).[1]

As the petition illustrates, the Second Circuit took a dairy farm and essentially recharacterized it as a CAFO, and therefore a "point source" under the Clean Water Act. 33 U.S.C. § 1362 (14). The court focused on the dairy barn and held that because crops were not grown where the cattle were fed, the entire farm did not fall within the clear and necessary regulatory exemption from the definition of CAFO afforded such facilities under 40 C.F.R. § 122.23(b)(1). Concerned Area Residents for the Environment v. Southview Farm, 34 F.3d 114, 123 (2d Cir. 1994). 40 C.F.R. § 122.23(b)(1). The implication of this determination is that crops apparently must be grown in a dairy barn, or cows must graze in the area where the crops grow in order for the exemption to apply. Id.

In contrast, the District Court, which was overruled, had reviewed the statute and regulatory framework and applied a

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[1] All references to "Petition" are to the Petition for Writ of Certiorari filed by Southview Farm and Richard H. Popp on February 1, 1995.

common sense approach: i.e., that a dairy farm on which crops are grown as an integral part of the dairy operation is not a CAFO and is exempt. Concerned Area Residents for the Environment v. Southview Farm, 834 F.Supp. 1422, 1432 (W.D.N.Y. 1993) rev'd 34 F.3d 114 (2d Cir. 1994).

More important, the Second Circuit determined that the natural run-off of manure from agricultural land constituted a discharge from a "point source" despite a precise exemption for agricultural stormwater run-off. 34 F.3d 114, 118-119. As a result, farmers formerly expressly exempted by Congress have now been judicially drawn into a statutory scheme which was never intended to apply to them.

The Decision has adverse implications for dairy farmers who have as few as 200 mature dairy cattle (40 C.F.R. § 122, app. B) because it subjects them to the Clean Water Act and significant additional cost. These costs will threaten the viability of family farms already subject to economic stress and inevitably lead to price increases to consumers of dairy products.

The EPA studied the economic impact on farmers of compliance with the Clean Water Act and estimated that in 1993, the minimum costs on the barn and farmyard area alone would have been between $20,000 and $65,000 for dairy herds of between 200 and 700 head. Commenters estimated that the original EPA 1974 cost estimates extrapolated to 1992 dollars, using a standard cost index, increased to approximately $98,000. 58 Fed. Reg. 7610, 7614-7615 (1993).

It is therefore clear that the issues presented by the petition are of paramount importance to farmers and consumers alike, and for this reason alone the petition should be granted.

POINT II

The decision will generate burdensome and costly litigation and administrative complications.

A court's role is to adjudicate, not legislate, and the Decision illustrates the weaknesses inherent in "judicial legislation." The Second Circuit held that it was within the province of the fact finder to make a determination whether run-off was qualified for the agricultural stormwater exemption: the court permitted a jury to determine that "sufficient quantities of manure were present so that the run-off could not be classified as 'stormwater.'" Concerned Area Residents For The Environment v. Southview Farm, 34 F.3d 114,121 (2d Cir. 1994). As the court did not define what constitutes a "sufficient quantity of manure," there is no way for a farmer to know whether the spreading of manure through an otherwise legal process is now rendered improper because the Decision provides no standards by which manure content of run-off may be measured. The absence of such standards makes the Decision wholly unworkable.

This fundamental flaw in the Decision was the product of a flawed process. As described in detail in the Petition, the Second Circuit adopted the position of the amicus brief of the United States Attorney General which was submitted only three working days before oral argument and to which there was no opportunity to respond. (Petition, p. 12, FN 3). In essence, the court, by adopting this amicus brief, has expanded

the reach of the Clean Water Act to regulate dairy farmers without the normal opportunities for public participation and other regulatory and legislative safeguards.

Finally, by limiting the agricultural stormwater exemption, the Decision exposes farmers to civil litigation and potential criminal penalties for violation of the Clean Water Act and applicable state and federal permitting requirements. It potentially permits disgruntled neighbors to bring farmers into federal court by conjuring up any conceivable application of the Clean Water Act to a farmer's manure disposal process. This is precisely the harm that Congress intended to avoid when it enacted the agricultural exemptions to the Clean Water Act.

For these reasons as well, the petition should be granted.

Conclusion

Dairylea and NMPF respectfully request that the petition for certiorari be granted.

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